

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 276 of 1996

with

CRIMINAL APPEAL No 348 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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LALURAM SAVJI KASOTA

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 276 of 1996  
MS BANNA S DUTTA for Petitioner  
MR KP RAVAL APP for Respondent No. 1
2. Criminal AppealNo 348 of 1996  
MS BANNA S DUTTA for Petitioner  
MR KP RAVAL APP for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE H.R.SHELAT

Date of decision: 13/09/1999

ORAL JUDGEMENT [ Per M.S. Parikh, J.]

1. Two accused persons, namely Laluram Savaji Kasota and Amrutlal Dhanraj Navad have been convicted and sentenced for being in possession of 10 Kgs. of Ganja on 24/1/1995 and sentenced for such possession to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs.1 lakh each, in default to undergo further sentence of one year each, as per the impugned judgment and order dated 16/3/1996 rendered by the learned Additional Sessions Judge, Sabarkantha at Himatnagar, camp at Modasa in Narcotics Case No.6/95. Each of the accused persons had an occasion to file the respective appeals which were placed for hearing before this Court. On 8/9/1999 we had an occasion to pass following order :-

"During the pendency of hearing of both these appeals it appeared that both the accused persons, namely Laluram Savaji Kasota and Amrutlal Dhanraj Navad have been convicted and sentenced for being in possession of 10 Kgs. of Ganja at the relevant point of time. We inquired from the learned advocate rendering legal assistance to the accused persons as to whether she had any instruction from the accused persons with regard to the facts of the case as well as sentence. Since the learned advocate did not have any instruction, we find it in the interest of justice to call the accused persons before the Court. We have been informed that both the accused persons are undergoing sentence in different jails, namely Central Jail, Sabarmati at Ahmedabad and the District Jail at Junagadh. We have also been informed that one of the accused persons had applied for early hearing of the appeal. However, the hearing of both these appeals has commenced in regular course according to serial number. We, therefore, issue following directions :-

Both the accused persons be brought before the Court on 13th September, 1999. Office to issue necessary process in compliance with this order to the concerned jail authority forthwith.

2. We have heard Ms. Banna Datta, learned advocate

appearing for the appellants who are hereinafter referred to as 'the accused persons' and Mr. K.P. Raval, Ld. A.P.P. for the State. It is no-doubt true that both the accused persons have not seriously contested conviction part of the judgment. It would, however, be just and proper to deal with the same in order to find out whether the prosecution has established the prosecution case beyond reasonable doubt.

3. The facts as can be gathered from the judgment of the learned trial Judge may briefly be stated : It appears that pursuant to the order of the District Superintendent of Police, P.S.I. Mr. B.R. Patel, Modasa Town Police Station and members of the staff Probationer P.S.I. Mr. M.S. Rana and Sub-Divisional Police Officer, Traffic Drive had the occasion of attending to vehicle checking in a traffic drive during 17 to 19 hours near Hazira Circle at Modasa on 24/1/1995. In the meantime two persons were approaching the place from the side of Shamalaji road holding their bags in their respective hands. They having seen the police persons at the place, started running generating doubt in the mind of the said police personnel. In the result P.S.I. Mr. Patel and the members of the staff chased and stopped them and upon inquiry as to the bags in their possession, they informed that they contained Ganja. This resulted in summoning two panch witnesses and one businessman with the required instruments of measures. They were informed about the incident which occurred on the spot. Upon making inquiry in presence of the Panch witnesses the two persons gave their respective names as stated hereinabove. They informed that they were inhabitants respectively of Madadi, Taluka Zadol, District Udaipur, Rajasthan and village Jamun, Taluka Zadol, District Udaipur. The respective bags, one of brown colour in possession of accused Laluram and another of white colour of galvanized steel sheets in possession of accused Amrutlal were got opened in presence of the Panchas and from each of the bags one white plastic bag each containing the dry branches of light green colour were found. On being asked as to what was that substance, they informed in presence of the Panchas that that contained Ganja and since there was no required permit or licence the substance was required to be weighed. Javaharbhai, a businessman, had attended to the work of the weighing of bags containing the aforesaid substance. Tin sheet bag weighed 6 Kgs. and brown colour suitcase weighed 4 Kgs. The samples were there and then taken in white paper folded into bag. The samples accordingly weighed around 100 grams of the substance. The same was placed in a white cloth bag duly

stitched and placed inside the bags with required slips signed by the Panchas and the P.S.I. Modasa with his designation. Accordingly, Muddamal article was seized and required complaint under section 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') was filed. The case was transferred to the Ld. Additional Sessions Judge for being tried. Both the accused persons pleaded not guilty resulting into holding of trial, recording of their statements and rendering the impugned judgment after hearing the learned advocates for the accused persons and the Ld. A.P.P. for the State.

4. Ms. Banna Datta, learned advocate appearing for accused persons, first submitted that there was noncompliance of mandatory provision of section 50 of the NDPS Act. However, bearing in mind the fact that search and seizure did not take place upon any prior information, but it was a coincidence that the incident had occurred as aforesaid, and that Gazetted Officer Dy.S.P. was present at the time of search and seizure and in his presence search and seizure had taken place, we do not find any substance in this part of the submission made on behalf of the accused persons.

Ms. Banna Datta read before us the evidence adduced before the trial Court. We have carefully gone through the evidence. We have no reason to differ from the reasons assigned by the Ld. Addl. Sessions Judge in appreciating the evidence while accepting the same. However, what is important to be noticed from the prosecution evidence is with regard to the actual weight of the contents of Ganja, in as much as what was weighed at the time of search and seizure was not only the substance itself, but the substance which was attached with its branches (\_\_\_\_\_) coupled with the bags. That would be an important circumstance while dealing with the question of sentence.

Some effort was made with regard to the procedure concerning sending of the samples for examination by the experts/expert in the Forensic Science Laboratory. It was submitted on behalf of the accused persons that the sample Muddamal was sent for examination after passage of 3 days after it was searched and seized. However, it would appear upon going through the intervening days that there was holiday intervening. Besides, we could not find any material to suspect dealing with the Muddamal article during the intervening period at any stage. Ld. Addl. Sessions Judge while dealing with this part of the defence submission, has come to the conclusion that there

was no unreasonable delay on the part of the prosecution agency in the present case. The Muddamal article in the form of sample reached the Forensic Science Laboratory on 27/1/1995. The receipt from the concerned authority of the Forensic Science Laboratory has been placed on record at exh. 20. Exh., 20 has been placed on record to point out to the Court that a sealed parcel of white cloth with seal of P.S.I. Modasa Town Police Station and the slip containing the signatures of Panchas Mahendrakumar Vadilal Gandhi and Mahendra Manilal Shah were intact. The Muddamal articles were found in sealed conditions before the Court. Bearing in mind all the facts and circumstances flowing from the prosecution evidence, the Ld. Addl. Sessions Judge has come to the conclusion that neither there was any delay on the part of the prosecution nor there was any circumstance which would indicate any suspicion with regard to dealing with Muddamal article during the short interval as aforesaid. Evidence of police constable Sonsinh Dalpatsinh exh.31 has been referred to by the Ld. Addl. Sessions Judge while dealing with this aspect of the matter. Having gone through all the relevant pieces of evidence, we are of the opinion that it cannot be said that there was undue and unreasonable delay on the part of the prosecution in sending the Muddamal (sample) article to Forensic Science Laboratory for examination.

5. The only defence which was set up by the accused persons in their statement u/S. 313 of the Code of Criminal Procedure was that it was false case filed against them. They have not brought out any reasons for the prosecuting agency for falsely implicating them.

6. Having dealt with the submissions made on behalf of the accused persons, we might enumerate the pieces of evidence placed on record by the prosecution and then proceed with the examination of question of sentence in this matter. Following witnesses have been examined by the prosecution :-

- i. Mahendrakumar Vadilal Gandhi, P.W. 1 Exh. 13
- ii. Mahendrabhai Manilal Shah, P.W. 2, Exh 18

Both of them have been the Panch witnesses.

- iii. Atmaram Ratilal Ranpura, P.W. 3, Exh. 19

The Forensic Officer from the Forensic Science Laboratory.

- iv. Smt. Rajnikanta Narendrakumar Shah, Exh.25  
who has been serving in the Forensic Science Laboratory, Ahmedabad.

- v. Natvarsinh Ratansinh Rathod, P.W. 5, Exh.26  
Constable of Modasa Town Police Station.

- vi. Sukaji Kavaji Pandav, P.W.6, Exh. 28, unarmed head constable, Modasa Town Police Station.
- vii. Somsinh Dalpatsinh, P.W. 7, Exh. 31, Head constable (writer) Modasa Town Police Station.
- viii. Gopalbhai Kodarbhai Prajapati, P.W. 8, Exh. 33
- ix. Bahadursinh Abhesinh Gohel, P.W. 9, Exh. 34, Dy.S.P. Modasa
- x. Becharbhai Raisangbhai Patel, P.W. 10, Exh.35, P.S.I. Modasa Town Police Station

The prosecution has also relied upon the following documents :-

- i. Panchnama exh. 14
- ii. Slip containing signatures of Panchas and Dy.S.P. exh.17
- iii. Communication dated 27/1/1995 from Forensic Science Laboratory exh. 20,
- iv. Analysis report from the Forensic Science Laboratory, exh. 21
- v. Botanical report exh. 23
- vi. The slip found from the bag of accused no. 2 exh.27
- vii. Original complaint exh. 37
- viii. True copy of wireless message exh,. 38
- ix. True copy of wireless message received from the District Superintendent of Police, exh. 39
- x. Entry from the station diary of Modasa Town Police Station, exh. 40
- xi. The despatch note, exh. 41.
- xii. The report of the Forensic Science Laboratory, exh. 42.

We have enumerated the aforesaid evidence for the purpose of finally dealing with the submissions concerning one of the pieces of evidence, the evidence of Panch witnesses, who turned hostile and did not support prosecution case. We may, therefore, deal with the same. The first witness is Mahendrakumar Vadilal Gandhi exh. 13, who is examined as P.W. No.1. He has stated in his examination-in-chief that he was proceeding towards Vinayak Talkies when the police called him and his signatures were taken at 4 to 5 places in two slips. Another Panch witness Mahendrabhai Manilal Shah was in his company at that point of time. He did not know what was to be done. Signatures were obtained on blank pieces of papers. He was then shown the Panchnama exh. 14 and he identified his signature in the said Panchnama. In view of his such evidence he was permitted to be cross-examined by the Ld. A.P.P. In his cross-examination he said that ordinarily he would sign after reading the papers, but in the case in hand he did

not do so. He was then confronted with the contents of Panchnama one after other. But he denied having so stated in the Panchnama. He however, identified the signature of another Panch witness Mahendrabhai Manilal Shah on the respective slips while identifying his signatures also.

7. Another Panch witness is Mahendrabhai Manilal Shah, P.W. 3, exh. 18. The tenor of his evidence is the same. What is important to be noticed from these hostile witnesses is that they had an occasion to be present at the time and place of the incident. What they have stated is that they signed in blank. But they have not denied their signatures on the respective documents as aforesaid. In this background, the evidence of the concerned Police Officer including Investigating Officer would assume importance and having gone through such evidence and consideration thereof by the Ld. Addl. Sessions Judge, we have no hesitation in discarding the submission that two panch witnesses having turned hostile, the prosecution has failed to establish its case with regard to occurrence of incident in question. In that view of the matter, having gone through the aforesaid enumerated pieces of evidence we find that the Ld. Addl. Sessions Judge has rightly convicted two accused persons for having been found in possession of prohibited article in the form of Ganja as aforesaid, but we have reservation with regard to the actual weighment of the Ganja as such and that would assume importance at the time of sentence.

8. We would, therefore, proceed to consider the submissions made on the question of sentence. It has been submitted on behalf of the accused persons that all concerned including the Ld. Addl. Sessions Judge have failed to consider the provisions of section 20 of the NDPS Act. It has been submitted that the provision, which would be applicable to the present case, would be clause (i) of section 20 (b). The said provision would read as under :-

"20. Punishment for contravention in relation to cannabis plant and cannabis.- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder. -

(a) xxx xxx xxx

(b) produces, manufactures, possesses, sells,

purchases, transports, imports inter-State,  
exports inter-State or uses cannabis,

shall be punishable -

- (i) where such contravention relates to ganja  
or the cultivation of cannabis plant,  
with rigorous imprisonment for a term  
which may extend to five years and shall  
also be liable to fine which may extent  
to fifty thousand rupees;

It has, therefore, been submitted that the Ld. Addl. Sessions Judge has apparently committed error in imposing sentence, which is spoken of in clause (ii) which succeeds above referred clause (i) and which speaks about cannabis other than ganja and sentence of not less than 10 years, but which may extend to 20 years and fine of not less than Rs.1 lac extending to Rs.2 lacs. Having gone through this aspect of the matter, Ld. A.P.P. fairly submitted that the present case is covered by clause (i) of section 20 (b) of the NDPS Act and not clause (ii) of section 20 (b) of the NDPS Act. In that view of the matter, reading the provision as it stands, the Ld. Addl. Sessions Judge clearly appears to have erred in imposing sentence of 10 years and fine of Rs.1 lac. The maximum sentence that the accused could have visited would be sentence of rigorous imprisonment of five years and fine of Rs.50,000/- each.

9. We are, therefore, required to deal with the question of sentence in the background of aforesaid provision of law which speaks maximum sentence of five years each and fine of Rs.50,000/- each.

10. The accused persons have been in jail since 25/1/1995 and they have been accordingly in custody as under trial prisoners and thereafter as convicted prisoners till upto today. They have already undergone sentence for 4 years and 7 months almost nearing the maximum sentence set out by the provision reproduced above. In this background, if we examine the weight of the ganja we cannot resist in making observation that prosecution has not taken care of weighing the Muddamal ganja as such. The prosecution has weighed the ganja with the branches coupled with the bags found from the possession of the concerned accused persons. It is no-doubt true that the accused persons have not explained their possession of the ganja. It has been submitted by Mr. K.P. Raval, Ld. A.P.P. that since they were

carrying ganja in the respective bags, it must be presumed that they were selling or trading in ganja without any permission or pass. He, therefore, submitted that no indulgence should be shown for imposing sentence of less than the maximum of five years as prescribed in the NDPS Act. Having noted the aforesaid drawback of the prosecution case and having heard the accused persons, who are present before us pursuant to the aforesaid order dated 8/9/1999, we are of the opinion that there were some compelling circumstances for the accused persons who at the outset said that they entered in the State of Gujarat with a view to undertake some labour work, if available. At that time they must have had the occasion of possessing the aforesaid offending article. Bearing in mind all the circumstances of the case, we pass following order :-

The conviction of the accused persons u/S. 20(b) of the NDPS Act is hereby specified to be conviction of the respective accused persons u/S. 20(b) (i) of the NDPS Act and sentence of the respective accused persons shall stand altered from that which has been imposed by the Ld. Addl. Sessions Judge to rigorous imprisonment of 3 . 1/2 years (three and half years) for each of the accused persons and fine of Rs.50,000/(Rupees fifty thousand only) for each of the accused persons. However, the default sentence is not hereby altered. As a result of this order, we find that the sentence which has been altered clearly appears to have been undergone by the respective accused persons. It is, therefore, directed that the respective accused persons shall be set at liberty forthwith, if not required for any other case.

Both these appeals will stand accordingly partly allowed.

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PVR.